U.S. Department of Labor

Office of Administrative Law Judges
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DATE ISSUED: October 4, 2000

CASE NO.: 2000-BLA-20

In the Matter of

RALPH E. WEBB,
Claimant

v.

ANDERSON & ANDERSON CONSTRUCTION, INC.,
Employer

and

WV CWP FUND,
Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest

Appearances:

Bobby S. Belcher, Jr., Esq.,
For the Claimant

Robert Weinberger, Esq.,
For the Carrier

Before: RICHARD A. MORGAN
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This proceeding arises from a duplicate claim for benefits, under the Black Lung Benefits Act,

30 U.S.C. § 901 *et seq.* ("Act"), filed on June 9, 1998. (DX 1).[1] The Act and implementing regulations, 20 C.F.R. parts 410, 718, and 727 (Regulations), provide compensation and other benefits to:

1. Living coal miners who are totally disabled due to pneumoconiosis and their dependents;
2. Surviving dependents of coal miners whose death was due to pneumoconiosis; and,
3. Surviving dependents of coal miners who were totally disabled due to pneumoconiosis at the time of their death.

The Act and Regulations define pneumoconiosis ("black lung disease" or "coal workers pneumoconiosis" "CWP") as a chronic dust disease of the lungs and its sequelae, including respiratory and pulmonary impairments arising out of coal mine employment.

PROCEDURAL HISTORY

The claimant filed his first prior claim for benefits on October 7, 1983. (DX 27-1). On May 31, 1985, the claim was denied because the evidence failed to establish claimant had pneumoconiosis and was totally disabled due to pneumoconiosis. (DX 27-16). On October 5, 1988, Administrative Law Judge Lipson issued a Decision and Order Denying Benefits. (DX 27-28). Judge Lipson found claimant established the existence of pneumoconiosis by x-ray evidence, but failed to establish that he was totally disabled by the disease.

The claimant filed his most recent claim for benefits on June 9, 1998. (DX 1). On September 30, 1998, the claim was denied by the District Director because the evidence failed to establish the elements of entitlement, that claimant had coal workers' pneumoconiosis and was totally disabled due to pneumoconiosis. (DX 17). On November 5, 1998, the claimant requested a hearing before an administrative law judge. (DX 18). By Proposed Decision and Order Memorandum of Conference dated June 11, 1999, the District Director denied benefits. On July 12, 1999, the claimant requested a formal hearing. (DX 24). On October 1, 1999, the case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs (OWCP) for a formal hearing. (DX 28). I was assigned the case on August 12, 2000.

On August 17, 2000, I held a hearing in Abingdon, Virginia, at which the claimant, employer, and insurer were represented by counsel.[2] No appearance was entered for the Director, Office of Workman Compensation Programs (OWCP). The parties were afforded the full opportunity to present evidence and argument. Claimant's exhibits ("CX") 1-2, Director's exhibits ("DX") 1-29, and Employer's exhibits ("EX") 1-3 were admitted into the record.

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[1] The following abbreviations are used for reference within this opinion: DX-Director's Exhibits; CX- Claimant's Exhibit; EX- Employer's Exhibit; TR- Hearing Transcript; Dep.- Deposition.

[2] Under *Kopp v. Director, OWCP*, 877 F.2d 307, 309 (4th Cir. 1989), the area the miner was exposed to coal dust is determinative of the circuit court's jurisdiction.

ISSUES

I. Whether the miner has pneumoconiosis as defined by the Act and the Regulations?

II. Whether the Miner's pneumoconiosis arose out of his coal mine employment?

III. Whether the miner is totally disabled?

IV. Whether the miner's disability is due to pneumoconiosis?

V. Whether there has been a material change in the claimant's condition?

FINDINGS OF FACT

I. Background

A. Coal Miner

I find and the parties agree the claimant was a coal miner, within the meaning of § 402(d) of the Act and § 725.202 of the Regulations, for at least twenty-nine years. (TR 6).

B. Date of Filing

The claimant filed his claim for benefits, under the Act, on June 9, 1998. (DX 1). (None) of the Act's filing time limitations are applicable; thus, the claim was timely filed.

C. Responsible Operator

Anderson & Anderson Construction, Inc. is the last employer for whom the claimant worked a cumulative period of at least one year and is the properly designated responsible coal mine operator in this case, under Subpart F, Part 25 of the Regulations. (TR 6).

D. Dependents[3]

The claimant has one dependent for purposes of augmentation of benefits under the Act, his wife. (TR 6).

E. Personal, Employment and Smoking History

The claimant decedent miner was born on January 18, 1924. He married Mamie Caldwell on

[3] See 20 C.F.R. §§ 725.204-725.211.

October 14, 1949. (DX 27-7). He worked in the coal mines for twenty-nine years. (TR 9). The claimant last worked in the coal mines in 1979 for Anderson & Anderson and he worked for them for at least twelve years. (TR 10). His last position in the coal mines was that of a maintenance worker repairing various machinery.[4] (TR 11-13).

Claimant testified that he is unable to perform his last coal mine job. He had difficulty breathing when he retired in 1979 and his ability to breath has worsened. (TR 14). Claimant testified that he is on oxygen and uses a breathing machine at night and uses a nebulizer. (TR 15-16). Claimant is only able to walk three or four steps before becoming short of breath. (TR 17). Claimant testified that he smoked until 1979 and started when he went into the service for World War II. (TR 18). Claimant testified that he did not smoke continuously and the most he ever smoked was one-half a pack per day. (TR 19). I find the claimant's testimony very credible.

There is evidence of record that the claimant's respiratory disability is due, in part, to his history of cigarette smoking. Although there is some discrepancy in the doctor's reports of the number of years claimant smoked, most of the physicians report claimant smoked half a pack of cigarettes per day for approximately thirty to forty years. I find his testimony credible and find claimant had a fifteen to twenty pack-year smoking history.

II. Medical Evidence

A. Chest X-rays

There were twelve readings of four x-rays, taken between November 2, 1983 and August 6, 1999.

Exh. #	**Dates: 1. x-ray 2. read**	**Reading Physician**	**Qualifi c-ations**	**Film Qual- ity**	**ILO Classif ication**	**Interpretation or Impression**
DX 27-15	11-02-83 11-16-83	Milner	BCR	1	0/1	s/s in two lower zones.
DX 27-14	11-02-83 10-13-84	Gaziano	B	1		No parenchymal or pleural abnormalities consistent with pneumoconiosis; emphysema.
DX 27-21	09-24-87 10-01-87	Bassali	B	1	1/1	s/t in six zones

[4] Claimant filled out Form CM-913 "Description of Coal Mine Work and Other Employment." In the form claimant described his mechanic work as requiring him to lift 50 to 75 pounds two times per day. Therefore, I find his last coal mine employment required moderate to heavy labor.

Exh. #	Dates: 1. x-ray 2. read	Reading Physician	Qualifi c-ations	Film Qual-ity	ILO Classif ication	Interpretation or Impression
DX 15	07-10-98 07-13-98	Forehand	B	2		Film completely negative.
DX 15	07-10-98 08-22-98	Navani	B; BCR	2		No parenchymal or pleural abnormalities consistent with pneumoconiosis; emphysema
EX 1	07-10-98 11-04-99	Wiot	B; BCR	2		No evidence of CWP, lungs fields overexpanded, consistent with emphysema.
EX 2	07-10-98 12-03-99	Spitz	B; BCR	1		No evidence of CWP, emphysema.
EX 3	07-10-98 12-22-99	Meyer	B; BCR	1		No evidence of CWP; nodular opacity at the left anterior fourth rib; emphysema.
DX 26	08-06-99 08-06-99	Robinette	B	1	0/1	p/q in one zone; no pleural abnormalities consistent with pneumoconiosis; few calcified granulomas.
DX 26	08-06-99 08-06-99	Mullens	BCR			Pulmonary hyperinflation consistent with obstructive pulmonary disease.
CX 6	08-06-99 10-01-99	Capiello	B; BCR	2	1/0	p/p in six zones; changes of chronic obstructive pulmonary disease, emphysema.
CX 6	08-06-99 10-07-99	Aycoth	B; BCR	1	1/0	p/p in six zones; scattered rounded density opacities up to 1.5 mm in both lungs.

* A- A-reader; B- B-reader; BCR- Board-certified radiologist; BCP-Board-certified pulmonologist; BCI= Board-certified internal medicine. Readers who are Board-certified radiologists and/ or B-readers are classified as the most qualified. *See Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 145 n. 16, 108 S.Ct. 427, 433 N.16, 98 L.Ed. 2d 450 (1987) and, *Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 1276 n.2 (7th Cir. 1993). B-readers need not be radiologists.

** The existence of pneumoconiosis may be established by chest x-rays classified as category 1, 2, 3, A, B, or C according to ILO-U/C International Classification of Radiographs. A chest x-ray classified as category "0," including subcategories 0/-, 0/0, 0/1, does not constitute evidence of pneumoconiosis. 20 C.F.R. § 718.102(b). In some instances, it is proper for the judge to infer a negative interpretation where the reading does not mention the presence of pneumoconiosis. *Yeager v. Bethlehem Mines Corp.*, 6 B.L.R. 1-307 (1983)(Under Part 727 of the Regulations) and *Billings v. Harlan #4 Coal Co.*, BRB No. 94-3721 (June 19, 1997))*(en banc*)(*Unpublished*). If no categories are chosen, in box 2B(c) of the x-ray form, then the x-ray report is not classified according to the standards adopted by the regulations and cannot, therefore, support a finding of pneumoconiosis.

B. Pulmonary Function Studies

Pulmonary Function Tests are tests performed to measure the degree of impairment of pulmonary function. They range from simple tests of ventilation to very sophisticated examinations requiring complicated equipment. The most frequently performed tests measure forced vital capacity (FVC), forced expiratory volume in one-second (FEV_1) and maximum voluntary ventilation (MVV).

Physician **Date** **Exh.#**	**Age** **Height**	**FEV_1**	**MVV**	**FVC**	**Tra-cings**	**Compre-hension Cooper-ation**	**Qual-ify***	**Dr.'s Impression**
Krishnan; Taylor 11-02-83 DX 27-13; DX 21-11	59 68.5	2.26	100	3.8		Good Good	No*	
White 04-17-98 DX 13	74	0.60 0.75+						Severe obstructive ventilatory impairment.
Vasudevan 07-10-98 DX 12	74 68"	.84 .80+	32 36+	2.08 2.08 +	Yes	Good Good	Yes* Yes+ *	Severe restrictive and obstructive lung function with no significant improvement post-bronchodilator. (Dr. Michos found vents acceptable, DX 14, DX 12).
Robinette 08-06-99 DX 26	75 67"	0.74 0.75+		1.68 2.04 +	Yes		Yes* Yes+ *	Very severe obstructive lung disease without response to bronchodilator.

* A "**qualifying"** pulmonary study or arterial blood gas study yields values which are equal to or less than the applicable table values set forth in Appendices B and C of Part 718.
** A study "**conforms**" if it complies with applicable quality standards (found in 20 C.F.R. § 718.103(b) and (c)). (*see Old Ben Coal Co. v. Battram*, 7 F.3d. 1273, 1276 (7th Cir. 1993)). A judge may infer, in the absence of evidence to the contrary, that the results reported represent the best of three trials. *Braden v. Director, OWCP*, 6 B.L.R. 1-1083 (1984). A study which is not accompanied by three tracings may be discredited. *Estes v. Director, OWCP*, 7 B.L.R. 1-414 (1984).
+Post-bronchodilator.

For a miner of the claimant's height of 68 inches, § 718.204(c)(1) requires an FEV_1 equal to or less than1.73 for a male 74 years of age.[5] If such an FEV_1 is shown, there must be in addition, an FVC

[5] The fact-finder must resolve conflicting heights of the miner on the ventilatory study reports in the claim. *Protopappas v. Director, OWCP*, 6 B.L.R. 1-221 (1983). This is particularly true when the discrepancies may affect whether or

equal to or less than 2.24 or an MVV equal to or less than 69; or a ratio equal to or less than 55% when the results of the FEV1 test are divided by the results of the FVC test. Qualifying values for other ages and heights are as depicted in the table below. The FEV_1/FVC ratio requirement remains constant.

Height	Age	FEV_1	FVC	MVV
68.5	59	1.95	2.48	78
68	74	1.73	2.24	69
67	75	1.63	2.12	65

C. Arterial Blood Gas Studies[6]

Blood gas studies are performed to detect an impairment in the process of alveolar gas exchange. This defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. A lower level of oxygen (O2) compared to carbon dioxide (CO2) in the blood indicates a deficiency in the transfer of gases through the alveoli which will leave the miner disabled.

Date Ex.#	Physician	pCO_2	pO_2	Qualify	Physician Impression
11-02-83 DX 27-11	Taylor	37.7	73.9	No	
10-06-87 DX 27-22	Buddington	37	68	No	Hypoxemia with hyperventilation.
04-17-98 DX 13	White	38.3	60	Yes	
07-10-98 DX 14	Vasudevan	39.7	59	Yes	(Dr. Michos, BCI, BCP, found ABG study acceptable, DX 14, DX 12)

not the tests are "qualifying." *Toler v. Eastern Associated Coal Co.*, 43 F.3d 3 (4th Cir. 1995). I find the miner is 68" here, his average reported height.

[6] 20 C.F.R. § 718.105 sets the quality standards for blood gas studies.
20 C.F.R. § 718.204(c) permits the use of such studies to establish "total disability." It provides:
In the absence of contrary probative evidence, evidence which meets the standards of either paragraphs (c)(1), (2), (3), (4), or (5) of this section shall establish a miner's total disability: . . .
(2) Arterial blood gas tests show the values listed in Appendix C to this part . . .

Date Ex.#	Physician	pCO_2	pO_2	Qualify	Physician Impression
08-06-99 DX 26	Robinette	36.7	71.0	No	

+ Results, if any, after exercise. Exercise studies are not required if medically contraindicated. 20 C.F.R. § 718.105(b).

D. Physicians' Reports

A determination of the existence of pneumoconiosis may be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers or suffered from pneumoconiosis. 20 C.F.R. § 718.202(a)(4). Where total disability cannot be established, under 20 C.F.R § 718.204(c)(1), (2), or (3), or where pulmonary function tests and/or blood gas studies are medically contraindicated, total disability may be nevertheless found, if a physician, exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in employment, i.e., performing his usual coal mine work or comparable and gainful work. § 718.204(b).

Dr. Taylor examined claimant on November 2, 1983. (DX 27-12). Claimant complained of wheezing, a productive cough, and dyspnea. Dr. Taylor reported the claimant smoked one-half a pack of cigarettes per day for twenty years. Dr. Taylor diagnosed black lung due to coal dust exposure.

Dr. Buddington examined claimant on October 6, 1987. (DX 27-22). Dr. Buddington noted the claimant worked thirty years in coal mine employment and was last employed as a maintenance man. Claimant is an ex-smoker with a ten pack per year history. Dr. Buddington reported the claimant suffered from a productive cough and shortness of breath. Dr. Buddington diagnosed slight chronic pulmonary disease based on history and probable angina pectoris. Dr. Buddington opined that the degree of impairment indicates that claimant does not have dyspnea at rest and seldom has dyspnea during usual activities of daily living. Claimant may develop dyspnea on exertion. Claimant was unable to perform a spirometric examination.

Dr. White, Board-certified in internal medicine with a subspecialty in pulmonary diseases, examined claimant on April 17, 1998. (DX 13). Claimant experienced an increase in dyspnea, wheezing and coughing since November of 1997. Claimant complained of shortness of breath at rest as well as worsening dyspnea with exertion. Claimant suffers from frequent wheezing and a productive cough. Claimant smoked for forty years, one-half a pack of cigarettes per day, quitting in 1983. Claimant worked in the coal mines for thirty years. Upon examination, Dr. White noted a few scattered wheezes and that claimant was short of breath at rest. Dr. White noted the spirometry showed a severe obstructive ventilatory impairment. Dr. White diagnosed CWP and severe chronic obstructive pulmonary disease. On May 1, 1998, Dr. White noted claimant remained dyspneic with mild exertion and was coughing less.

Dr. Vasdevan examined claimant on July 10, 1998. (DX 13). Dr. Vasdevan noted the claimant worked thirty years in the coal mines as a mechanic, welder, tippleman, and car loader. Claimant complained of a productive cough, wheezing and dyspnea. Dr. Vasdevan reported the claimant smoked from 1940 until 1982, one-half to one pack of cigarettes per day. Dr. Vasdevan noted a pulmonary function study showed severe restrictive and obstructive lung function and arterial blood gases showed moderately severe hypoxemia. Dr. Vasdevan diagnosed COPD due to smoking with severe impairment.

Dr. Robinette, Board-certified in internal medicine with a subspecialty in pulmonary diseases and a B-reader, submitted a report dated August 16, 1999. (DX 26). Claimant complained of excessive dyspnea on exertional activity which has been progressive over the past twenty years. Dr. Robinette reported claimant takes breathing medications, Albuterol, ipratropium, Servent, Flovent, Prednisone, and Combivent. Dr. Robinette reported claimant stopped smoking in 1979 and smoked one-half to one pack of cigarettes per day with an approximate thirty year smoking history. Claimant experiences profound dyspnea on minimal exertional activity. Dr. Robinette reported claimant worked in the mining industry for twenty-nine years. Dr. Robinette noted a chest x-ray demonstrated the lungs were expanded with marked pulmonary hyperinflation and a few areas of interstitial changes in the left perihilar region consistent with pneumoconiosis, with profusion "0/1."

Dr. Robinette found the pulmonary function study consistent with very severe obstructive pulmonary disease with evidence of severe air trappings and marked impairment of the diffusion capacity. Resting arterial blood gases were normal. Dr. Robinette noted severe pulmonary emphysema and early interstitial fibrosis; very severe obstructive lung disease with evidence of marked impairment of the diffusion capacity; and, history of progressive pulmonary disability due to end stage lung disease. Dr. Robinette concluded that the claimant had severe pulmonary disease which is at least partially attributable to his past coal dust exposure. Dr. Robinette noted that claimant's smoking history contributed somewhat to his pulmonary disability, but he does not discount the role of coal dust exposure. The claimant's condition is irreversible, chronic and associated with profound disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Entitlement to Benefits

This claim must be adjudicated under the regulations at 20 C.F.R. Part 718 because it was filed after March 31, 1980. Under this Part, the claimant must establish, by a preponderance of the evidence, that he has pneumoconiosis, that his pneumoconiosis arose from coal mine employment, and that he is totally disabled due to pneumoconiosis. Failure to establish any one of these elements precludes entitlement to benefits. *20 C.F.R. §§ 718.202-718.205; Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 B.L.R. 1-26 (1987); and, *Perry v. Director, OWCP*, 9 B.L.R. 1-1 (1986). *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 170 (4th Cir. 1997).

Since this is the claimant's second claim for benefits, he must initially show that there has been a material change of conditions.[7] To assess whether a material change in conditions is established, the Administrative Law Judge ("Administrative Law Judge") must consider all of the new evidence, favorable and unfavorable, and determine whether the claimant has proven, at least one of the elements of entitlement previously adjudicated against him in the prior denial, i.e., disability due to the disease. *Lisa Lee Mines v. Director, OWCP,* 86 F.3d 1358 (4th Cir. 1996) (*en banc*); *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994); and *LaBelle Processing Co. v. Swarrow*, 72 F.3d 308 (3d Cir. 1995). *See Hobbs v. Clinchfield Coal Co.* 917 F.2d 790, 792 (4th Cir. 1990). If the miner establishes the existence of that element, he has demonstrated, as a matter of law, a material change.[8]

Administrative Law Judge Lipson denied claimant's first application for benefits because the evidence failed to show that the claimant was totally disabled by pneumoconiosis. (DX 27-28). Under the *Sharondale* standard, the claimant must show the existence of one of these elements by way of newly submitted medical evidence in order to show that a material change in condition has occurred. If he can show that a material change has occurred, then the entire record must be considered in determining whether he is entitled to benefits. *Sharondale*. Based on the newly submitted evidence, I find that claimant has established that he is totally disabled. Therefore, I will consider the entire record in determining whether the miner is entitled to benefits.

B. Existence of Pneumoconiosis

Pneumoconiosis is defined as a "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment."[9] 30 U.S.C. § 902(b) and 20 C.F.R. §718.201. The definition is not confined to "coal workers' pneumoconiosis," but also includes other diseases arising out of coal mine employment, such as anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, progressive massive fibrosis, silicosis, or silicotuberculosis. 20 C.F.R. § 718.201. The term "arising out of coal mine employment" is defined as including "any

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[7] Section 725.309(d) provides, in pertinent part:

> In the case of a claimant who files more than one claim for benefits under this part, . . . [i]f the earlier miner's claim has been finally denied, the later claim shall also be denied, on the grounds of the prior denial, unless the [Director] determines there has been a material change in conditions . . . (Emphasis added).

[8] Unlike the Sixth Circuit in *Sharondale*, the Fourth Circuit does not require consideration of the evidence in the prior claim to determine whether it "differ[s] qualitatively" from the new evidence. *Lisa Lee Mines*, 86 F.3d at 1363 n.11. The Administrative Law Judge must then consider whether all of the record evidence, including that submitted with the previous claim, supports a finding of entitlement to benefits. *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994) and *LaBelle Processing Co. v. Swarrow*, 72 F. 3d 308 (3rd Cir. 1995).

[9] Pneumoconiosis is a progressive and irreversible disease; once present, it does not go away. *Mullins Coal Co. v. Director, OWCP,* 484 U.S. 135, 151 (1987); *Lisa Lee Mines v. Director*, 86 F.3d 1358 (4th Cir. 1996)(*en banc*) at 1364; *LaBelle Processing Co. v. Swarrow*, 72 F.3d 308 (3d Cir. 1995) at 314-315.

chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment."

" . . . [T]his broad definition 'effectively allows for the compensation of miners suffering from a variety of respiratory problems that may bear a relationship to their employment in the coal mines.'" *Robinson v. Pickands Mather & Co./Leslie Coal Co. & Director, OWCP*, 14 B.L.R. 2-68 (4th Cir. 1990) at 2-78, 914 F.2d 35 (4th Cir. 1990) *citing*, *Rose v. Clinchfield Coal Co.*, 614 F. 2d 936, 938 (4th Cir. 1980). Thus, asthma, asthmatic bronchitis, or emphysema may fall under the regulatory definition of pneumoconiosis if they are related to coal dust exposure. *Robinson v. Director, OWCP*, 3 B.L.R. 1-798.7 (1981); *Tokarcik v. Consolidation Coal Co.*, 6 B.L.R. 1-666 (1983). Likewise, chronic obstructive pulmonary disease may be encompassed within the legal definition of pneumoconiosis. *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173 (4th Cir. 1995).

The claimant has the burden of proving the existence of pneumoconiosis. The Regulations provide the means of establishing the existence of pneumoconiosis by: (1) a chest x-ray meeting the criteria set forth in 20 C.F.R. § 718.202(a); (2) a biopsy or autopsy conducted and reported in compliance with 20 C.F.R. § 718.106; (3) application of the irrebuttable presumption for "complicated pneumoconiosis" found in 20 C.F.R. § 718.304; or (4) a determination of the existence of pneumoconiosis made by a physician exercising sound judgment, based upon certain clinical data and medical and work histories, and supported by a reasoned medical opinion. 20 C.F.R. § 718.202(a).

In *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 2000 WL 524798 (4th Cir. 2000), the Fourth Circuit held that the administrative law judge must weigh all evidence together under 20 C.F.R. § 718.202(a) to determine whether the miner suffered from coal workers' pneumoconiosis.

The claimant cannot establish pneumoconiosis pursuant to subsection 718.202(a)(2) because there is no biopsy evidence in the record. The claimant cannot establish pneumoconiosis under § 718.202(a)(3), as none of that sections presumptions are applicable to a living miner's claim filed after Jan. 1, 1982, with no evidence of complicated pneumoconiosis.

A finding of the existence of pneumoconiosis may be made with positive chest x-ray evidence.[10] 20 C.F.R. § 718.202(a)(1). "[W]here two or more x-ray reports are in conflict, in evaluating such x-ray reports, consideration shall be given to the radiological qualifications of the physicians interpreting such x-rays." *Id.; Dixon v. North Camp Coal Co.*, 8 B.L.R. 1-344 (1985)."(Emphasis added). (Fact one is Board-certified in internal medicine or highly published is not so equated). *Melnick v. Consolidation Coal Co. & Director, OWCP*, 16 B.L.R. 1-31 (1991) at 1-37. Readers who are Board-certified radiologists and/or B-readers are classified as the most qualified. The qualifications of a certified radiologist are at least comparable to if not superior to a physician

[10] "There are twelve levels of profusion classification for the radiographic interpretation of simple pneumoconiosis . . . *See* N. LeRoy Lapp, '*A Lawyer's Medical Guide to Black Lung Litigation*,' 83 W. VA. LAW REVIEW 721, 729-731 (1981)." Cited in *Lisa Lee Mines v. Director*, 86 F.3d 1358 (4th Cir. 1996)(*en banc*) at 1359, n. 1.

certified as a B-reader. *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211, 1-213 n. 5 (1985).

A judge is not required to defer to the numerical superiority of x-ray evidence, although it is within his or her discretion to do so. *Wilt v. Woverine Mining Co.*, 14 B.L.R. 1-70 (1990) citing *Edmiston v. F & R Coal*, 14 B.L.R. 1-65 (1990). This is particularly so where the majority of negative readings are by the most qualified physicians. *Dixon v. North Camp Coal Co.*, 8 B.L.R. 1-344 (1985); *Melnick v. Consolidation Coal Co. & Director, OWCP*, 16 B.L.R. 1-31, 1-37 (1991).

It is rational to credit more recent evidence, solely on the basis of recency, only if it shows the miner's condition has progressed or worsened. *Adkins v. Director, OWCP*, 958 F.2d 49, 16 B.L.R. 2-61 (4th Cir. 1992). The court reasoned that, because it is impossible to reconcile conflicting evidence based on its chronological order if the evidence shows that a miner's condition has improved, inasmuch as pneumoconiosis is a progressive disease and claimants cannot get better, "[e]ither the earlier or the later result must be wrong, and it is just as likely that the later evidence is faulty as the as the earlier. . ." *See also, Thorn v. Itmann Coal Co.*, 3 F.3d 713, 18 B.L.R. 2-16 (4th Cir. 1993).

There were twelve readings of four x-rays, taken between November 2, 1983 and August 6, 1999. Of the x-rays submitted in the prior claim, between November of 1983 and September of 1987, Dr. Bassali, B-reader, diagnosed pneumoconiosis. Dr. Gaziano, B-reader, did not diagnose pneumoconiosis; however, he diagnosed emphysema. Dr. Milner, a Board-certified radiologist, did not diagnose CWP, but noted a profusion of "0/1." Although Judge Lipson found this evidence established the existence of pneumoconiosis, I afford more weight to the recent x-rays, which were taken ten years after Judge Lipson's decision.

The recent evidence establishes that claimant's emphysema has worsened. Claimant had early signs of emphysema and CWP in the 1980's. In the most recent x-ray interpretations of x-rays taken in 1998 and 1999, well qualified physicians diagnosed emphysema and/or COPD. Drs. Navani, Wiot, Spitz and Meyer, qualified as B-readers and Board-certified radiologists, interpreting the July 10, 1998 x-ray, did not diagnose CWP; however, all diagnosed emphysema. Dr. Forehand, a B-reader, found the July 10, 1998 x-ray completely negative. I credit the dually qualified physicians' opinions over the opinion of Dr. Forehand, and find the July 10, 1998 x-ray negative for "medical" pneumoconiosis, but positive for emphysema.

Four physicians interpreted the August 6, 1999 x-ray. Drs. Capiello and Aycoth, both Board-certified in radiology and B-readers, diagnosed pneumoconiosis. Dr. Capiello also noted changes of chronic obstructive pulmonary disease and emphsyma. Dr. Mullens, a Board-certified radiologist, diagnosed obstructive pulmonary disease. Dr. Robinette, a B-reader, did not diagnose pneumoconiosis by x-ray.[11] I afford the most weight to Drs. Capiello and Aycoth, both dually qualified, and find the August 6, 1999 x-ray positive for pneumoconiosis. Furthermore, Dr. Mullens, Board-certified radiologist, found evidence of obstructive pulmonary disease.

[11] However, Dr. Robinette found claimant had severe pulmonary disease partially attributable to coal dust exposure.

Based on a review of the chest x-ray evidence, I find the claimant has established the existence of CWP. The most recent chest x-ray, dated August 6, 1999, was interpreted as positive by two dually-qualified physicians. Furthermore, the July 10, 1998 ray was interpreted by four dually-qualified physicians as positive for emphysema, which can qualify for "legal" pneumoconiosis under the regulations. As discussed more fully below, I find that the claimant's emphysema was caused in part by coal mine employment. Therefore, I find the x-ray evidence establishes the existence of CWP.

A determination of the existence of pneumoconiosis can be made if a physician, exercising sound medical judgment, based upon certain clinical data, medical and work histories and supported by a reasoned medical opinion, finds the miner suffers or suffered from pneumoconiosis, as defined in § 718.201, notwithstanding a negative x-ray. 20 C.F.R.
§ 718.202(a).

Medical reports which are based upon and supported by patient histories, a review of symptoms, and a physical examination constitute adequately documented medical opinions as contemplated by the Regulations. *Justice v. Director, OWCP*, 6 B.L.R. 1-1127 (1984). However, where the physician's report, although documented, fails to explain how the documentation supports its conclusions, an Administrative Law Judge may find the report is not a reasoned medical opinion. *Smith v. Eastern Coal Co.*, 6 B.L.R. 1-1130 (1984). A medical opinion shall not be considered sufficiently reasoned if the underlying objective medical data contradicts it.[12] *White v. Director, OWCP*, 6 B.L.R. 1-368 (1983).

Physician's qualifications are relevant in assessing the respective probative value to which their opinions are entitled. *Burns v. Director, OWCP*, 7 B.L.R. 1-597 (1984). As a general rule, more weight is given to the most recent evidence because pneumoconiosis is a progressive and irreversible disease. *Stanford v. Director, OWCP*, 7 B.L.R. 1-541 (1984); *Tokarcik v. Consolidated Coal Co.*, 6 B.L.R. 1-166 (1983); and, *Call v. Director, OWCP*, 2 B.L.R. 1-146 (1979). This rule is not to be mechanically applied to require that later evidence be accepted over earlier evidence. *Burns v. Director, OWCP*, 7 B.L.R. 1-597 (1984).

I do not afford much weight to the physicians' reports submitted in the prior claim because neither physicians' credentials are of record. Furthermore, I find Dr. Taylor's opinion not well reasoned because he summarily diagnosed CWP without any analysis and he does not discuss total disability. I also find Dr. Buddington's opinion not well reasoned. Dr. Buddington diagnosed slight chronic pulmonary disease based on history, and was unable to perform a spirometric exam. Dr. Buddiginton also only noted that claimant may develop dyspnea on exertion, but does not discuss total disability in relation to his last coal mine employment.

Dr. White, Board-certified in internal medicine with a subspecialty in pulmonary diseases,

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[12] *Fields v. Director, OWCP*, 10 B.L.R. 1-19, 1-22 (1987). "A 'documented' (medical) report sets forth the clinical findings, observations, facts, etc., on which the doctor has based his diagnosis. A report is 'reasoned' if the documentation supports the doctor's assessment of the miner's health. *Fuller v. Gibraltor Coal Corp*., 6 B.L.R. 1-1291 (1984). . ."

diagnosed CWP and severe COPD. Dr. White noted claimant's forty year smoking history at one-half a pack of cigarettes per day and thirty years of coal mine employment. I afford Dr. White's opinion more weight than Dr.Vasdevan because Dr. White is better qualified.

Dr. Vasdevan diagnosed severe restrictive and obstructive lung function, and COPD due to smoking. I do not afford Dr. Vasdevan's opinion great weight because her credentials are not of record.

Dr. Robinette, Board-certified in internal medicine with a subspecialty in pulmonary diseases, found the claimant had severe pulmonary disease which was partially attributable to his past coal dust exposure. I afford Dr. Robinette's opinion great weight based on his qualifications. Furthermore, Dr. Robinette considered claimant's smoking and coal mine dust exposure in finding that coal dust exposure contributed to his severe pulmonary disease.

Dr. Robinette, found that coal dust contributed to the miner's severe pulmonary disease. Dr. White also diagnosed CWP and COPD. Furthermore, the x-ray interpretations, by the most well qualified physicians, found the claimant suffered from emphysema and COPD. In addition, I found the most recent x-ray positive of CWP. Therefore, I find the claimant has met his burden of proof in establishing the existence of coal workers' pneumoconiosis. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed.2d 221 (1994).

C. Cause of pneumoconiosis

Once the miner is found to have pneumoconiosis, he must show that it arose, at least in part, out of coal mine employment. 20 C.F.R. § 718.203(a). If a miner who is suffering from pneumoconiosis was employed for ten years or more in the coal mines, there is a rebuttable presumption that the pneumoconiosis arose out of such employment. 20 C.F.R. § 718.203(b). If a miner who is suffering or suffered from pneumoconiosis was employed less than ten years in the nation's coal mines, it shall be determined that such pneumoconiosis arose out of coal mine employment only if competent evidence establishes such a relationship. 20 C.F.R. § 718.203(c).

Since the miner had ten years or more of coal mine employment, he receives the rebuttable presumption that his pneumoconiosis arose out of coal mine employment. Because the well qualified physicians found coal dust contributed to his CWP, I find the employer has not rebutted the presumption.

D. Existence of total disability due to pneumoconiosis

The claimant must show his total pulmonary disability is caused by pneumoconiosis. 20 C.F.R. § 718.204(b).[13] Sections 718.204(c)(1) through (c)(5) set forth criteria to establish total disability: (1)

[13] The Fourth Circuit rule is that "nonrespiratory and nonpulmonary impairments have no bearing on establishing total disability due to pneumoconiosis." *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241 (4th Cir. 1994). In *Milburn Colliery*

pulmonary function studies with qualifying values; (2) blood gas studies with qualifying values; (3) evidence the miner has pneumoconiosis and suffers from cor pulmonale with right-sided congestive heart failure; (4) reasoned medical opinions concluding the miner's respiratory or pulmonary condition prevents him from engaging in his usual coal mine employment; and (5) lay testimony.[14] Under this subsection, the Administrative Law Judge must consider all the evidence of record and determine whether the record contains "contrary probative evidence." If it does, the Administrative Law Judge must assign this evidence appropriate weight and determine "whether it outweighs the evidence supportive of a finding of total respiratory disability." *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-21 (1987); *see also Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195, 1-198 (1986), *aff'd on reconsideration en banc*, 9 B.L.R. 1-236 (1987).

Section 718.204(c)(3) is not applicable because there is no evidence that the claimant suffers from cor pulmonale with right-sided congestive heart failure. § 718.204(c)(5) is not applicable because it only applies to a survivor's claim in the absence of medical evidence.

Section 718.204(c)(1) provides that a pulmonary function test may establish total disability if its values are equal to or less than those listed in Appendix B of Part 718. More weight may be accorded to the results of a recent ventilatory study over those of an earlier study. *Coleman v. Ramey Coal Co.*, 18 B.L.R. 1-9 (1993). There were four pulmonary function studies performed between November of 1983 and August of 1999. I afford greater weight to the most recent studies. The November 2, 1983 study did not produce qualifying results. I do not afford the study by Dr. White much weight because it appears incomplete. Because the two most recent studies of record performed on July 10, 1998 and August 6, 1999 produced qualifying results showing severe lung disease, I find the claimant has established total disability by pulmonary function studies.

Claimants may also demonstrate total disability due to pneumoconiosis based on the results of arterial blood gas studies that evidence an impairment in the transfer of oxygen and carbon dioxide between the lung alveoli and the blood stream. § 718.204(c)(2). More weight may be accorded to the results of a recent blood gas study over one which was conducted earlier. *Schretroma v. Director, OWCP*, 18 B.L.R. 1-17 (1993). There were five arterial blood gas studies performed between November 2, 1983 and August 6, 1999. The early studies performed in 1983 and 1987 did not produce qualifying results. The most recent studies produced mixed results. Studies performed on April 17, 1998 and July 10, 1998, produced qualifying results. The study performed on August 6, 1999, produced a non-qualifying result. Because of the mixed results, with the most recent study

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Co. v. Director, OWCP,[Hicks], 21 B.L.R. 2-323, 138 F.3d 524, Case No. 96-2438 (4th Cir. Mar. 6, 1998) *citing Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 243 (4th Cir. 1994), the Court "rejected the argument that '[a] miner need only establish that he has a total disability, which may be due to pneumoconiosis in combination with nonrespiratory and nonpulmonary impairments.'" Even if it is determined that claimant suffers from a totally disabling respiratory condition, he "will not be eligible for benefits if he would have been totally disabled to the same degree because of his other health problems." *Id*. at 534.

[14] 20 C.F.R. § 718.204(c). In a living miner's claim, lay testimony "is not sufficient, in and of itself, to establish disability." *Tedesco v. Director, OWCP*, 18 B.L.R. 1-103 (1994).

producing a non-qualifying result, I find claimant has not established total disability by arterial blood gas studies.

Finally, total disability may be demonstrated, under § 718.204(c)(1), if a physician, exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in employment, i.e., performing his usual coal mine work or comparable and gainful work. § 718.204(b). Under this subsection, " . . . all the evidence relevant to the question of total disability due to pneumoconiosis is to be weighed, with the claimant bearing the burden of establishing, by a preponderance of the evidence, the existence of this element." *Mazgaj v. Valley Camp Coal Company*, 9 B.L.R. 1-201 (1986) at 1-204. The fact finder must compare the exertional requirements of the claimant's usual coal mine employment with a physician's assessment of the claimant's respiratory impairment. *Schetroma v. Director, OWCP*, 18 B.L.R. 1-19 (1993). Once it is demonstrated that the miner is unable to perform his usual coal mine work a *prima facie* finding of total disability is made and the burden of going forward with evidence to prove the claimant is able to perform gainful and comparable work falls upon the party opposing entitlement, as defined pursuant to 20 C.F.R. § 718.204(b)(2). *Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83 (1988).

As explained above, I do not afford much weight to Drs. Taylor or Buddington who examined the claimant in connection with his original claim. All of the physicians of record who examined claimant in conjunction with his most recent claim agreed that claimant has severe pulmonary impairment, but disagreed on the cause. Although Dr. Vasdevan attributed claimant's COPD to smoking, she nevertheless found claimant had a severe impairment. Dr. White diagnosed a severe obstructive ventilatory impairment and noted claimant was short of breath with mild exertion. Dr. Robinette noted claimant experienced profound dyspnea with minimal exertional activity and found a very severe obstructive pulmonary disease.

The physicians submitting reports in conjunction with claimant's most recent claim agree that claimant suffers a severe respiratory impairment. Because claimant suffers from dyspnea with minimal exertion and based on the qualifying pulmonary function studies, I find him unable to perform his last coal mine employment which required moderate to heavy labor. Therefore, the claimant has met his burden of proof in establishing the existence of total disability. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed.2d 221 (1994).

E. Cause of total disability[15]

The Fourth Circuit Court of Appeals requires that pneumoconiosis be a "contributing cause" of

[15] *Billings v. Harlan #4 Coal Co.*, ___ B.L.R. ___ , BRB No. 94-3721 (June 19, 1997). The Board has held that the issues of total disability and causation are independent; therefore, administrative law judges need not reject a doctor's opinion on causation simply because the doctor did not consider the claimant's respiratory impairment to be totally disabling.

the claimant's total disability.[16] *Toler v. Eastern Associated Coal Co.*, 43 F. 3d 109, 112 (4th Cir. 1995); *Jewel Smokeless Coal Corp. v. Street*, 42 F.3d 241, 243 (4th Cir. 1994). In *Street*, the Court emphasized the steps by which the cause of total disability may be determined by directing "the Administrative Law Judge [to] determine whether [the claimant] suffers from a respiratory or pulmonary impairment that is totally disabling and whether [the claimant's] pneumoconiosis contributes to this disability." *Street*, 42 F.3d 241 at 245.

"A claimant must be totally disabled due to pneumoconiosis and any other respiratory or pulmonary disease, not due to other non-respiratory or non-pulmonary ailments, in order to qualify for benefits." *Beatty v. Danri Corp. & Triangle Enterprises*, 16 B.L.R. 1-11 (1991) *aff'd* 49 F.3d 993 (3d Cir. 1995) *accord Jewell Smokeless Coal Corp.*.(So, one whose disability is only 10% attributable to pneumoconiosis would be unable to recover benefits if his completely unrelated physical problems (i.e., stroke) created 90% of his total disability). The fact that a physician does not explain how he could distinguish between disability due to coal mining and cigarette smoking or refer to evidence which supports his total disability opinion, may make his opinion "unreasoned." *Gilliam v. G&O Coal Co.*, 7 B.L.R. 1-59 (1984).

There is evidence of record that claimant's respiratory disability is due, in part, to his history of cigarette smoking. However, to qualify for Black Lung benefits, the claimant need not prove that pneumoconiosis is the "sole" or "direct" cause of his respiratory disability, but rather that it has contributed to his disability. *Robinson v. Pickands Mather & Co./Leslie Coal Co. & Director, OWCP*, 914 F.2d 35, 14 B.L.R. 2-68 (4th Cir. 1990) at 2-76. *Jones v. Badger Coal Co.*, 21 B.L.R. 1-102, BRB No. 97-1393 BLA (Nov. 30, 1998)(*en banc*). There is no requirement that doctors "specifically apportion the effects of the miner's smoking and his dust exposure in coal mine employment upon the miner's condition." *Jones v. Badger Coal Co.*, 21 B.L.R. 1-102, BRB No. 97-1393 BLA (Nov. 30, 1998)(*en banc*) *citing generally, Gorzalka v. Big Horn Coal Co.*, 16 B.L.R. 1-48 (1990).

Dr. Robinette, considering claimant's smoking history, found that claimant's severe pulmonary disease was partially attributable to his past coal dust exposure. Dr. Vasdevan found claimant's COPD and disability due to cigarette smoking. Because Dr. Robinette is well qualified and Dr. Vasdevan's qualifications are not of record, I afford Dr. Robinette's opinion the most weight. Dr. White did not explain whether claimant's disability was due to cigarette smoking, coal dust exposure or both. However, Dr. White diagnosed both CWP and severe obstructive pulmonary disease.

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[16] *Hobbs v. Clinchfield Coal Co.* 917 F.2d 790, 792 (4th Cir. 1990). Under *Robinson v. Pickands Mather & Co./Leslie Coal Co. & Director, OWCP*, 14 B.L.R. 2-68 at 2-76, *914 F.2d 35* (4th Cir. 1990), the terms "due to," in the statute and regulations, means a "contributing cause.," not "exclusively due to." In *Roberts v. West Virginia C.W.P. Fund & Director, OWCP*, 74 F.3d 1233 (1996 WL 13850)(4th Cir. 1996)(Unpublished), the Court stated, "So long as pneumoconiosis is a 'contributing' cause, it need not be a 'significant' or substantial' cause." Id.

Based on Dr. Robinette's opinion in conjunction with Dr. White's diagnosis and claimant's twenty-nine years of coal mine employment, I find that claimant's emphysema, COPD and CWP, in part, arose out of coal mine employment and is a contributing cause to his disability.

F. Date of entitlement

Benefits are payable beginning with the month of the onset of total disability due to pneumoconiosis. 20 C.F.R. § 725.503. Because no specific onset date of disability is evident from the record, benefits will begin on the first day of the month in which he filed this claim, June 1, 1998. 20 C.F.R. § 725.503(b).

ATTORNEY FEES

An application by the claimant's attorney for approval of a fee has not been received; therefore no award of attorney's fees for services is made. Thirty days is hereby allowed to the claimant's counsel for the submission of such an application. Counsels' attention is directed to 20 C.F.R. §§ 725.365- 725.366. A service sheet showing that service has been made upon all the partes, including the claimant, must accompany the application. Parties have ten days following receipt of any such application within which to file any objections. The Act prohibits charging of a fee in the absence of an approved application.

CONCLUSIONS

In conclusion, the claimant has established that a material change in conditions has taken place since the previous denial, because he is now disabled due to pneumoconiosis. The claimant has pneumoconiosis, as defined by the Act and Regulations. The pneumoconiosis arose out of his coal mine employment. The claimant is totally disabled. His total disability is due to pneumoconiosis. He is therefore entitled to benefits.

ORDER

It is ordered that the claim of RALPH E. WEBB for benefits under the Black Lung Benefits Act is hereby GRANTED.

It is further ordered that the employer, ANDERSON & ANDERSON CONSTRUCTION, INC. / WV CWP FUND, shall pay to the claimant all benefits to which he is entitled under the Act commencing June 1, 1998.[17]

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[17] 20 C.F.R. § 725.530 (within 30 days of this order). In any case in which the fund has paid benefits on behalf of an operator or employer, the latter shall simultaneously with the first payment of benefits to the beneficiary, reimburse the fund

RICHARD A. MORGAN
Administrative Law Judge

RAM:EAS:dmr

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits review Board within 30 days from the date of this Order by filing a Notice of Appeal with the **Benefits Review Board, ATTN: Clerk of the Board, P.O. Box 37601, Washington, D.C. 20013-7601**. A copy of a Notice of Appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits, at the Frances Perkins Building, Room N-2117, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

(with interest) for the full amount of all such payments. 20 C.F.R. § 725.602(a). If an employer does not pay benefits after the Director's initial determination of eligibility, it may be ordered to pay the beneficiary simple interest on all past due benefits at a rate according to the Internal Revenue Code§ 6621. 20 C.F.R. §§ 725.608(a) and 725.608(c).